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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RON ANTWONE JOHNSON, Defendant and Appellant.	B297944 (Los Angeles County Super. Ct. No. TA102619)

APPEAL from an order of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Assistant Attorney General, Idan Ivri and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Ron Antwone Johnson appeals from a postconviction order denying his petition for resentencing under Penal Code section 1170.95.[1] On appeal Johnson contends the trial court erred in summarily rejecting his petition to resentence him as to his second degree murder conviction without first appointing him counsel, inviting a response from the People, and holding a hearing. The People highlight Johnson was also convicted of conspiracy to commit murder, showing he acted with express malice and the specific intent to kill. We agree with the People and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Johnson was convicted of conspiracy to commit murder, the murder of Thornell Williams, and the attempted murder of LaToya Powers. This court affirmed the convictions in *People v. Johnson* (Aug. 26, 2003, B157448) (nonpub opn.) (*Johnson I*). As this court described the evidence at trial, "After being shot at by Pocket Hood Crips gang members, David Greer asked [Johnson] to help him retrieve a gun. Greer and [Johnson] were members of the rival Athens Park Blood gang. On March 11, 2000, accompanied by Brian ('K-down'), they picked up a .45-caliber handgun and some bullets for K-down's .38-caliber handgun. The three men then went to Wilmington Street in Compton. [Johnson] drove and Greer sat in the front seat, armed with the .45-caliber handgun. K-down was in the back seat, armed with

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[1] All further statutory references are to the Penal Code.

his .38-caliber handgun. . . . Williams and . . . Powers were walking on Wilmington Street near 132nd Street. [Johnson] pulled up to them and Greer yelled: 'Fuck Craps,' a term of disrespect for Crips. Greer and K-down[] fired a total of five shots at Williams and Powers. Williams was seriously injured and Powers was killed." (*Johnson I, supra*, B157448.)

After the shooting, a witness provided a partial license plate number and description of the shooter's car. The next morning the police detained and arrested Johnson, who was driving a vehicle matching the plate number and description. After waiving his *Miranda*[2] rights, Johnson confessed to participating in the driveby shooting, and he later showed police where the guns were hidden. (*Johnson I, supra*, B157448.)

The trial court instructed the jury as to conspiracy to commit murder with CALJIC No. 8.69, in relevant part, "The crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely, the specific intent to kill unlawfully another human being." Further, "In order to prove this crime, each of the following elements must be proved: [¶] 1. Two or more persons entered into an agreement to unlawfully kill another human being; [¶] 2. Each of the persons specifically intended to enter into an agreement with one or more other persons for that purpose; [¶] 3. Each of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and [¶] 4. An overt act was committed in this state by one or more of the persons who agreed and intended to commit murder."

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

On the murder count, the trial court instructed the jury with CALJIC Nos. 8.10 and 8.11. on both express and implied malice. As to implied malice, the court instructed the jury that "[m]alice is implied when, [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act were dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to[,] and with conscious disregard for, human life."

The jury found Johnson guilty of conspiracy to commit murder, second degree murder (Powers),[3] and attempted premeditated murder (Thornell). (*Johnson I, supra*, B157448.) As to count 2 for second degree murder, the jury found true the allegations, among others, the offense was committed to benefit a gang (§ 186.22, subd. (b)(1)); a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)); a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)); and a principal personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds.

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[3] Although this court described the conviction as a special circumstances murder based on the jury's finding true two special circumstances allegations, as the People note, "[i]n order for a special circumstance allegation to be found true, the defendant must also have first been found guilty of first degree murder. (§ 190.2.)" (*People v. Friend* (2009) 47 Cal.4th 1, 71.) The abstract of judgment does not reflect the special circumstances findings, and the court correctly did not impose a sentence of life without the possibility of parole under section 190.2, subdivision (a).

(d) & (e)(1)).[4] The court sentenced Johnson to an aggregate term of 90 years to life in prison. (*Johnson I, supra*, B157448.) This court affirmed. (*Ibid*.)

On February 13, 2019 Johnson, in pro. per., filed a petition for relief with a supporting declaration stating he had met the requirements under section 1170.95 for relief under Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), including that (1) the information allowed the prosecution to proceed under a theory of felony murder or the natural and probable consequences doctrine; (2) he was convicted of murder based on a theory of felony murder or the natural and probable consequences doctrine; and (3) Johnson could not be convicted of first or second degree murder under changes to sections 188 and 189, effective January 1, 2019. Johnson requested the court appoint him counsel and vacate his murder conviction.

On March 14, 2019 the superior court denied Johnson's petition to vacate the murder conviction, referring to the facts in this court's opinion in *Johnson I*, concluding, "This wanton, violent[,] reckless and senseless pre[]meditated, planned and carefully orchestrated pay[]back gang shooting clearly and unequivocally excludes petitioner from the amended sections of . . . sections 188 and 189." It is undisputed the court did not

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[4] Although the opinion states Johnson was charged with personally and intentionally discharging a firearm, the firearm allegations were alleged and found true as to a principal using a firearm under section 12022.53, subdivision (e)(1). We therefore reject the People's argument Johnson was the actual shooter based on the jury's finding true he personally and intentionally discharged a firearm causing death under section 12022.53, subdivision (d).

hold a hearing or appoint a lawyer for Johnson. Johnson timely appealed.

DISCUSSION

A. *Senate Bill 1437*

On September 30, 2018 Senate Bill No. 1437 (2017-2018 Reg. Sess.) was signed into law, effective January 1, 2019. Senate Bill 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Sen. Bill 1437 (2017-2018 Reg. Sess.) § 1; see *People v. Verdugo* (2020) 44 Cal.App.5th 320, 325 (*Verdugo*), review granted Mar. 18. 2020, S260493; *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).) "Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability." (*Martinez*, at p. 723; accord, *Verdugo*, at p. 325.)

New section 188, subdivision (a)(3), provides, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."[5] Senate Bill 1437 also added section

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[5] Prior to the enactment of Senate Bill 1437 (2017-2018 Reg. Sess.), former section 188 provided, "Such malice may be express

189, subdivision (e), which provides, "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

Senate Bill 1437 also provides a procedure in new section 1170.95 for an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and be resentenced on any remaining counts if he or she could not have been convicted of murder under Senate Bill 1437's changes to sections 188 and 189. (Sen. Bill 1437 (2017-2018 Reg. Sess.) § 4.) Section 1170.95, subdivision (a), provides, "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed

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or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." Section 1170.95, subdivision (b)(1), provides that the petition "shall be filed with the court that sentenced the petitioner."[6] Pursuant to section 1170.95, subdivision (b)(1)(A), the petition must include a declaration by the petitioner that he or she is eligible for relief under the section.

The Legislature intended for there to be a three-step evaluation of a section 1170.95 petition. (*Verdugo, supra*, 44 Cal.App.5th at pp. 328, 332-333.) As we explained in *Verdugo*, "If any of the required information is missing and cannot be readily ascertained by the court, 'the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.' (§ 1170.95, subd. (b)(2).) [¶] If the petition contains all required information, section 1170.95, subdivision (c), prescribes a two-step process for the court to determine if an order to show cause should issue: 'The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall

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[6] Judge Gary R. Hahn was the sentencing judge. (*Johnson I, supra*, B157448.) However, Judge Hahn retired in 2012, and Judge Allen J. Webster, Jr., reviewed Johnson's petition.

appoint counsel to represent the petitioner. The prosecutor shall file and serve a response . . . and the petitioner may file and serve a reply . . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.'" (*Verdugo*, at p. 327.)

After issuing an order to show cause, the trial court must hold a hearing "to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts . . . ." (§ 1170.95, subd. (d)(1).) If a hearing is held, "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) "[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (*Ibid*.)

B. *The Trial Court Did Not Err in Summarily Denying the Petition Without Appointing Counsel or Holding a Hearing*

Johnson contends under section 1170.95, subdivision (c), he was entitled to appointment of counsel and a hearing because he alleged facts that, if true, would have entitled him to relief. We rejected this contention in *Verdugo*. (*Verdugo, supra*, 44 Cal.App.5th at pp. 328, 332-333.) As part of the first prima facie determination required by section 1170.95, subdivision (c), the court may consider "documents in the court file or otherwise part of the record of conviction that are readily ascertainable." (*Verdugo*, at pp. 327, 329 [superior court properly considered record of conviction and appellate opinion affirming conviction in concluding defendant had intent to kill because of conviction of conspiracy to commit murder]; accord, *People v. Lewis* (2020)

43 Cal.App.5th 1128, 1138-1139, review granted Mar. 18, 2020, S260598 [superior court properly relied on record of conviction showing he was convicted as direct aider and abettor in determining he was not eligible for relief].)

As we explained in *Verdugo*, to determine whether the petitioner is eligible for relief on the basis he was convicted of first or second degree murder under a charging document that permitted the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences theory, "the court must at least examine the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment." (*Verdugo, supra*, 44 Cal.App.5th at pp. 329-330.) We added, "The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding Senate Bill 1437's amendments to sections 188 and 189 (see § 1170.95, subd. (a)(3))—for example, a petitioner who admitted being the actual killer as part of a guilty plea or who was found to have personally and intentionally discharged a firearm causing great bodily injury or death in a single victim homicide within the meaning of section 12022.53, subdivision (d)." (*Id.* at p. 330.)

Here, the jury found Johnson guilty of conspiracy to commit murder, which, as instructed, required the jury to find Johnson "harbored express malice aforethought, namely a specific intent to kill unlawfully another human being." (CALJIC No. 8.69; accord, *People v. Johnson* (2013) 57 Cal.4th 250, 263-264 ["'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to

commit an offense, *as well as the specific intent to commit the elements of that offense*, together with proof of the commission of an overt act . . . .'"]; *People v. Jurado* (2006) 38 Cal.4th 72, 120 [same].)

Johnson was therefore not eligible for relief under Senate Bill 1437 because under new section 189, subdivision (e), he could still be convicted of murder based on his intent to kill.[7] (*People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 414, 419 [petitioner not eligible for relief under Sen. Bill 1437 because jury found true felony-murder special-circumstance instruction, which required jury to find aider and abettor intended to kill or was a major participant and acted with reckless indifference to human life]; see *People v. Gonzalez* (2018) 5 Cal.5th 186, 202 [trial court's failure to instruct on lesser offenses was harmless error because jury finding true the felony-murder special circumstance necessarily meant jury found aiders and abettors had the intent to kill or were major participants and acted with reckless indifference].)

Because Johnson failed to make the initial prima facie showing for relief under section 1170.95, subdivision (c), he was not entitled to appointed counsel or a hearing. (*Verdugo, supra*, 44 Cal.App.5th at pp. 332-333 ["If, as here, the court concludes the petitioner has failed to make the initial prima facie showing

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[7] Although the superior court focused on the nature of the killing and not the conviction of conspiracy to commit murder, "[w]e will affirm the trial court's ruling if it is correct on any theory of law applicable to the case, even if for reasons different than those given by the trial court." (*People v. Evans* (2011) 200 Cal.App.4th 735, 742; accord, *Young v. Fish & Game Com.* (2018) 24 Cal.App.5th 1178, 1192-1193.)

required by subdivision (c), counsel need not be appointed."]; *People v. Lewis, supra*, 43 Cal.App.5th at p. 1140 ["[T]he trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner 'falls within the provisions' of the statute."].)

DISPOSITION

The order denying Johnson's petition for resentencing is affirmed.

FEUER, J.

We concur:

PERLUSS, P. J.

SEGAL, J.